



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE 2091 OF 2015

BONIFACE NZIVO KINGO.....CLAIMANT

VERSUS

SITIMA ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 25.11.2015 alleging that he was unlawfully dismissed from his employment by the respondent and prayed for the following reliefs.

a)

(i) Unlawful dismissal – 13,356 x 12 = Shs.160,272.00

(ii) 3 months salary in lieu of notice 13,356x3 = Shs.40,068.00

(iii) Gratuity and severance pay – 15 days for every worked year 150 x 514 = Shs.77,100.00

Shs.290,796.00

Less loan advance Shs.9,000.00

Less 2 days absence Shs. 1,050.00

Shs.10,050.00

Shs.10,050.00

TOTAL

Shs.280,746.00

b) Damages for unlawful termination

c) Such other dues as may be found due to the Claimant

d) Any other relief(s) as the Court may deem fit to grant

e) Costs and interest of this suit.

2. The respondent filed her defence on 25.1.2016 denying the alleged unlawful dismissal and averred that it is indeed the claimant who deserted employment after being suspended on 27.6.2015 to pave way for investigation against him. She therefore prayed for the suit to be dismissed and counterclaimed against the Claimant in one month salary in lieu of notice and outstanding loan of Kshs.9,000.

Claimant's Evidence

3. The Claimant testified as Cw1. He adopted his written statement. He testified that he was employed by the Respondent as General Worker in 2005 and from 2013 he was asked to assist the foreman in a construction site. He however denied ever being given the specific duty of guarding materials which were being used by the other workers. In 2015 the respondent alleged that materials were lost and confiscated the phones for all the workers including him (Claimant) for investigation. That the respondent discovered that he had received large sums of money in his Mpesa account and suspecting him of theft summarily suspended him.

4. In his oral evidence in Court, he testified that on 27.6.2015, he reported to work as usual but he was made to sit down until 1 pm when he was told that he was a thief and dismissed by his boss Mr. Samir Shah. He however was not told what he stole he was only told to leave immediately.

5. He thereafter instructed a lawyer to serve demand letter. He denied the alleged theft and contended that he had a personal business, which he was receiving money into his mpesa account and produce an Agreement dated 3.9.2015 between him and Mini Bakery to prove that he indeed had a business of selling bread.

6. In cross examination, the Claimant contended that initially in 2008 he worked for the Respondent under a verbal contract but later in 2015 he was issued with an appointment letter. He denied ever being served with any suspension letter and contended that he was dismissed. He however admitted that he was a member of the NSSF but contended he had no evidence that the employer remitted his NSSF dues.

Defence evidence

7. Mr. Samir Shah testified for the Respondent as Rw1. He also adopted his written statement as his testimony. He testified that the Claimant was employed by the Respondent as a General Worker on 1.8.2005 for a Gross salary of Kshs.11,300 per month. He further testified that the Claimant was suspended on 27.6.2015 to allow investigation of his suspicious conduct. That before the conclusion of the investigations, the Claimant instructed a lawyer to serve demand letter alleging that he had been dismissed.

8. He denied ever dismissing the claimant and contended that the claimant by his own conduct of instructing a lawyer to demand terminal dues amounted to resignation without notice. He therefore prayed for judgment against the Claimant in terms of the counterclaim by the respondent. He denied all the prayers by the Claimant but admitted that he was only entitled to Kshs.4,347 for earned leave.

9. In his oral testimony, Rw1 contended that the Claimant was in charge of security to protect the respondent's business from construction workers. That when a shortfall of stock was discovered, the Claimant was suspended to allow investigations but he instructed a lawyer to demand his terminal dues.

10. In cross examination, Rw1 contended that the Claimant was first suspended verbally but later a letter was drafted. He denied ever dismissing the claimant and maintained that his conduct of instructing a lawyer to demand dues was deemed to amount to resignation from his employment.

11. Rw1 admitted that the intended investigation were never concluded because there was no evidence that the Claimant stole. He further admitted that he never called Claimant back to work because his lawyer said that he was not willing to report back. He further admitted that he never reported the claimant to the police because he had no evidence against him. He also admitted that he never served the Claimant with chow cause letter for absconding. Finally, he admitted that the claimants gross pay as at 31.5.2015 was Kshs.13,356 per month.

12. He contended that he used to deduct NSSF from the Claimant's salary and remit to the fund regularly. He further contended that the Claimant used to go for his annual leave.

Claimant's submissions

13. The Claimant submitted that he was unfairly dismissed contrary to section 45(2) and 41 of the Employment Act. That there was no valid and fair reason to justify the dismissal and he was not accorded a chance to defend himself before the dismissal was decided.

14. He further submitted that even if he was suspended as alleged by the respondent, the same was inordinate and it amounted to a breakdown in the employer-employee relationship and therefore summary dismissal. He noted that Rw1 admitted that there was no proof or evidence against the him that he had stolen but still never called him back to work. He relied on **David Gichana Omuya Vs Mombasa Maize Millers [2014]eKLR** where Radido J held that the right to hearing before dismissing an employee is mandatory under section 41 of the Employment Act.

15. As regards the reliefs sought, the Claimant contended that he was entitled to the one month salary in lieu of notice under section 35(1)(c) of the Act. That he was entitled to gratuity at the rate of 15 days' pay per year of service under section 35(5) of the Act and fortified that submission by **Elijah Kipkoros Tonui V Ngara Opticians T/A Bright Eyes Limited [2014]eKLR** where Rika, J held that this Court has the power to substitute service pay as social security of NSSF contributions appear inferior to the former. Finally, he submitted that he is entitled to accrued leave by dint of section 28 of the Employment Act. He therefore urged the Court to grant the reliefs sought in his suit.

Respondent's Submissions

16. The respondent submitted that the Claimant was not dismissed on 27.6.2015 but only suspended to allow investigation on suspected theft of company property, which was kept under his watch. She relied on her letter dated 27.6.2015 as the evidence that the claimant was never dismissed on 27.6.2015 as he alleged. She further submitted that the burden of proving the alleged dismissal rested with the Claimant under

section 107 and 108 of the Evidence Act and the only way of discharging it is by way of evidence. She urged the Court to find that no tangible evidence was proffered by the Claimant to prove the alleged dismissal but mere fictions, false and unsubstantiated allegations. She relief on *Kelvin Reynold Namale v Yako Supermarket Company Ltd [2019]eKLR* where Nduma J restated that the burden of proving unfair dismissal was at the heart of employees case.

17. The respondent further submitted that the Claimant has not addressed the issue of suspension and instead, without any evidence maintained his position that he was dismissed. She submitted that she sent the claimant on suspension under administrative disciplinary action, which was a prerogative as the employer. She contended that the suspensions was lawful because it was based on reasonable grounds and relied on *Enoch Anyango & another v Kenya Union of Savings and Credit Cooperatives Ltd [2015]eKLR* to fortify the foregoing submission.

18. As regards the reliefs sought, the respondent submitted that the claimant was not dismissed by her and as such he is not entitled to salary in lieu of notice and compensation for unlawful termination. She also submitted that the claim for severance pay or gratuity was without any basis in law because the claim was not terminated on account of redundancy. In addition she submitted that the Claimant was a beneficiary of the NSSF remittances and as such under section 35(6) of the Employment Act he was disqualified from claiming service pay. She urged the Court not to follow *Elijah Kipkoros Tonui v Ngara Opticians Case* because it is bad law. She, however admitted that the Claimant is entitled to his leave for 2015 which she computed at Ksh.4,347 on prorata basis.

19. Finally the Respondent submitted that the Claimant separated himself from the employment without notice after being sent on suspension and as such he should pay her Kshs.13,300 being one month salary in lieu of notice plus loan advance of Kshs.9,000 as admitted in paragraph 13 of the Reply to defence. She therefore prayed for judgment as prayed in the counterclaim.

Analysis and determination

20. There is no dispute that the Claimant was employed by the Respondent as a General worker at the Respondent's construction site from 2005 to 27.6.2015 when he was stopped from working and sent away by the respondent. The issues for determination are:

- a) Whether the claimant was unfairly dismissed by the Respondent or he deserted employment.
- b) Whether the claimant is entitled to the reliefs sought by his suit.
- c) Whether the counterclaim should be allowed.

Desertion or Unfair dismissal

21. The burden of proving desertion lies with the employer while the burden of proving unfair dismissal lies with the employee. The respondent alleged that she suspected the claimant of theft of company property after noticing large sums of money deposited in his Mpesa account after some property had been lost from her stock. She further contended that she verbally suspended the claimant to allow investigations and later a suspension letter was drafted. She produced the letter dated 27.6.2015. She submitted that the suspension was a lawful disciplinary process and was based on reasonable grounds. She further submitted that the disciplinary process that had been initiated by the suspension was frustrated by the Claimant's decision to instruct a lawyer to demand terminal dues. She opined that the said demand amounted to resignation by the Claimant.

22. On the other hand, the Claimant contended that sometimes in 2015, the Rw1 alleged that property had been stolen from the site and confiscated the mobile phones for all the employees. That upon checking his mpesa account, Rw1 noticed large sums on money deposited from his private business and suspected him of theft. That on 27.6.2015, Rw1 denied him work and made him to sit down until 1 p.m when he told him that he was a thief and dismissed him without telling him what he had stolen. He denied ever being served with the suspension letter dated 27.6.2015 and maintained that he was verbally dismissed on 27.6.2015 by the Rw1. That after the dismissal he instructed a lawyer who served a demand letter on 14.7.2015. In the alternative he submitted that, even if he was suspended as alleged by Rw1, the said suspension amounted to summary dismissal.

23. The Court has agonized over the rival contentions and submissions presented. Rw1 admitted on cross examination that on 27.6.2015, he suspended the Claimant verbally and later drafted the suspension letter dated 27.6.2015. He however never proved service of the said letter on the claimant. He also did not tell the Court what were the terms of the suspension he communicated to the Claimant verbally. According to the Claimant on the 27.6.2015, Rw1 called him a thief and told him to go away. That in his view, he was dismissed from service and that is why he instructed a lawyer to demand for his terminal dues.

24. After careful consideration of the evidence and submission, this Court finds that on a balance of probability the suspension letter dated 27.6.2015 was drafted after the demand letter was served to defeat the claim for unlawful dismissal. That notwithstanding the court has noted that by his written statement filed together with the claim, the claimant acknowledged that he was suspended for theft. He stated in paragraph 2 of the said statement that:-

“Early this year the Respondent purported to have lost some of the materials where it confiscated all mobile phones from all the workers including me. From my mpesa account the respondent discovered that I had a busy account where I received big amounts of money and there it was concluded that I was a suspect and therefore I was summarily suspended on allegations of theft by servant.”

25. In view of the foregoing admission of the suspension, I opine that the denial of the same during his oral testimony was an afterthought. Although the said written statement did not state the date of the said summary suspension, the Court is alert to the fact that the claimant never testified on any two separate incidents when Rw1 made him to stay from work. I am therefore without doubt that the incidence forming the

subject of the written statement is the same one in his oral testimony in court, being the suspension communicated verbally by Rw1 on 27.6.2015. That is however, the far I can agree with the respondent.

26. The claimant has invited the court to make a finding that, if at all, he was suspended on 27.6.2015, the said suspension was inordinate, and it amounted to summary dismissal. I have carefully considered the said invitation and the circumstances of this case. As earlier observed herein above, Rw1 did not tell the court the terms for the oral suspension. Peradventure, the terms were as per the written suspension letter dated 27.6.2015, then I agree with the claimant that it was on unreasonable and unfounded suspension. The suspension was for an indefinite period and without salary or allowances and it was not founded on the terms of the contract of service or known provision of the law. After careful perusal of the Appointment letter signed on 31.3.2015 I did not locate that mode of disciplinary action therein.

27. Whereas it is trite that the employer has a right to suspend an employee pending investigation into his conduct, such suspension must be upon terms, which are reasonable. That the terms of the suspension must find their basis in the law or the contract of service or else it becomes unlawful and the employee is entitled to deem the same as amounting to termination of the contract of service. That is what is called constructive termination of employment.

28. In view of the foregoing, I find that the Claimant has proved on a balance of probability that what the respondent intended to be an indefinite suspension without pay to allow investigations was in his interpretation amounting to dismissal and he was therefore entitled to instruct a lawyer to demand his terminal dues from the Respondent. Consequently, I dismiss the respondent's defence that the claimant separated himself from employment through desertion. That is corroborated by the fact that Rw1 admitted that he never called the Claimant back to work or served him with a show cause letter for absconding work.

29. Having found that the claimant never deserted his employment, and that he was entitled to treat the conduct of the Rw1 as amounting to summary dismissal, the question that begs for an answer is whether the said dismissal was unfair and unlawful as alleged by the Claimant.

30. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason related to the employee's conduct, capacity and compatibility or based on the employer's operational requirements and that a fair procedure was followed.

Reason for termination

31. In this case the reason cited for the dismissal was suspected theft of company property. However Rw1 admitted that he had no proof of the said theft and that is why he never reported the matter to the police or taken any further action against the claimant. Under section 43 of the Employment Act, the employer has a burden of proving the reason for dismissing his employee and in default, the dismissal is rendered unfair within the meaning of section 45 of the Act. Based on the admission by Rw1, I return that the dismissal of the claimant herein was unfair.

Procedure followed

32. The claimant's case is that his phone was first confiscated and on 27.6.2015 he was kept sitting down until 1 p.m when on enquiring as to why he was kept idle, Rw1 called him a thief and sent him away for an indefinite suspension without pay. Such procedure is contrary to section 41 of the Employment Act which requires that before dismissing an employee for misconduct, the employer must explain the offence to him in a language he understands and in the presence of another employee and thereafter accord the employee and his chosen companion a chance to air their representations, which must be considered before the dismissal is decided.

33. The respondent did not tender any evidence to prove that she complied with such statutory procedure and indeed admitted that he never concluded the investigations or called the Claimant back to work. That coupled with the fact that the dismissal was without a valid and fair reason, rendered the dismissal of the Claimant unfair and I so hold.

Reliefs in the suit

34. Under section 49(1) of the Employment Act, I award the claimant one month salary in lieu of notice plus ten months salary compensation for unfair termination. In awarding the foregoing, I have considered the fact that the appointment letter provided for notice period of 30 days before termination of the contract. I have also considered the fact that the Claimant did not contribute to the dismissal through misconduct. Finally, I considered that he had served the respondent for 10 years.

35. I further award the claimant 21 days leave pursuant to the letter of appointment. The respondent admitted that the claimant was entitled to his leave for 2015 but she did not tell how many days. The claimant claimed for leave for one year and that is what I grant to him less 2 days he admitted to have absented himself from work.

36. The claim for gratuity is dismissed because it was not provided for in the letter of appointment. Consequently, the claimant will have to be content with the NSSF because under section 35(6) of the Employment Act, he is disqualified from service pay because he is a beneficiary of the NSSF. On the basis of the express statutory provision disagree with the decision by Rika J in *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited [2015]eKLR*.

37. The claim for damages for unlawful termination is adequately remedied by the compensation for unlawful dismissal above.

Counterclaim

38. In view of the finding herein that the claimant was unlawfully and unfairly dismissed from his employment, I dismiss the respondent's

claim for one month salary in lieu of notice. I however award her Kshs.9,000 being loan advance to the claimant which was pleaded and admitted by the claimant.

Conclusion and disposition

39. I have found that the suspension of the claimant for indefinite period and without pay was unreasonable and the claimant was entitled to treat it as summary dismissal. I further found that the said constructive dismissal was unfair and unlawful and the claimant is entitled to the reliefs sought. Consequently, I enter judgment for the claimant against the respondent as follows:-

(a) One month notice	Kshs. 13,356.00
(b) 10 months' salary compensation.....	133,560.00
(c) 19 days leave (basic pay).....	8,487.15
	155,403.15
Less	9,000.00
	Kshs.146,403.15

The award is less statutory deduction. The claimant will also have costs and interest at court rate from the date hereof.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July 2019

ONESMUS N. MAKAU

JUDGE